No. 76-238

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE NATIONAL FARMERS' ORGANIZATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND
ASSOCIATED MILK PRODUCERS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a), as modified upon the denial of rehearing (Pet. App. 12a), is reported at 534 F. 2d 113. The memorandum and order of the district court (Pet. App. 13a-43a) are reported at 394 F. Supp. 29.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1976. A timely petition for rehearing was denied on May 19, 1976, and the petition for a writ of certiorari was filed on August 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court correctly denied a private party intervention as of right in a government antitrust suit, in order to oppose settlement of the case by a consent judgment, when the court found that there was no evidence of impropriety or of failure by the government adequately to represent the public interest, and the private party had a full and fair opportunity to present its objections.

STATUTE AND RULE INVOLVED

Section 2 of the Antitrust Procedures and Penalties Act, Pub. L. 93-528, 88 Stat. 1706, 15 U.S.C. (Supp. V) 16, is set forth at Pet. App. 69a-73a. Rule 24 (a)(2), Fed. R. Civ. P., is set forth at Pet. App. 68a.

STATEMENT

On February 1, 1972, the United States filed a civil antitrust suit against Associated Milk Producers, Inc. ("AMPI"), an agricultural cooperative marketing association. The complaint charged that AMPI had violated Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 and 2, by conspiring to restrain and by monopolizing the production and sale of milk. The parties subsequently engaged in extensive pretrial proceedings (Pet. App. 2a).

In January, 1974, the parties began serious settlement negotiations, and on August 13, 1974, they presented a proposed consent decree to the district court. The district court ordered an extensive series of procedures designed to provide it with sufficient information to determine whether the consent decree would serve the public interest, including the solicitation of comments from interested persons and groups (Pet. App. 16a-17a).

Petitioner, National Farmers Organization ("NFO"), was among those responding. NFO is an organization composed of farmers; it competes with AMPI and is conducting private antitrust litigation against AMPI.[1] It filed extensive comments with the district court, urging that no consent decree be entered, and that in any event the proposed decree was too lenient.

The United States filed a 99-page response to the questions and comments received, in which it explained its reasons for agreeing to the decree (Pet. App. 17a). The response correlated each violation charged in the complaint with sections of the proposed decree designed to remedy the violations, and it explained why dissolution or divestiture of AMPI was not in the public interest (Pet. App. 44a-46a).[2] The government also made available the massive economic study on which it based its analysis (Pet. App. 20a).

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[1] *Alexander* v. *National Farmers Organization*, W.D. Mo., Civ. No. 19191-1. A judgment in the government suit that AMPI had violated the Sherman Act would, under Section 5(a) of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. (Supp. V) 16(a), be entitled to *prima facie* effect in NFO's private action.

[2] The response noted the unusual legal context of the suit: AMPI is an agricultural producers' cooperative, and the Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291-292, exempts from the Sherman Act the joining together of dairy farmers to carry out the objectives of "processing, preparing for market, handling and marketing" so long as they refrain from predatory practices. It pointed out that, as a cooperative, AMPI's market power is dependent upon membership, not ownership of capital, and that a member may leave AMPI and sell his milk in competition with AMPI through another cooperative or directly to a producer. The response stated that since the chief vice of AMPI's conduct was that by a variety of predatory practices it blocked this competition for markets, the judgment, by specifically outlawing these practices, is calculated to dissipate AMPI's monopoly power and return the industry to a competitive footing. J.A. 262-264. ("J.A." refers to the appendix filed in the court of appeals.)

On October 28, 1974, NFO, alleging that the United States had failed adequately to represent the public interest, moved to intervene.[3] Relying on the Final Report of the Select Committee on Presidential Campaign Activities, S. Rep. No. 981, 93d Cong., 2d Sess. (1974) ("Watergate Report"), NFO claimed that the Justice Department's handling of the suit has been compromised by AMPI's alleged attempts to thwart filing of the suit. Pressed by the district court for specifics, NFO admitted the good faith and honesty of the government personnel who negotiated and proposed the decree[4], but it repeated its contention that the Watergate Report was "a sufficient showing of corrupting influence at work * * * [to justify its] intervention * * * " (Pet. App. 23a-24a). NFO requested an evidentiary hearing on its charges. The district court on November 14, 1974, directed NFO to outline the proof it would adduce at a hearing, to which NFO on November 22, 1974, replied:

> In view of the Court's judicial notice of the Final Report of the Senate Watergate Committee * * * NFO does not propose to adduce additional proof on this issue * * * [J.A. 625].

The court deferred ruling on NFO's motion for intervention pending consideration of the consent decree.

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[3]NFO moved for intervention of right under Rule 24(a)(2), Fed. R. Civ. P., and for permissive intervention under Rule 24(b), Fed. R. Civ. P. The petition does not challenge the denial of permissive intervention (Pet. 5, n. 5).

[4]Petitioner's counsel also conceded the good faith and integrity of "the people within the Antitrust Division whom I know" (Pet. App. 23a). At the same time, another proposed intervenor, Sentry Foods, informed the court that "we have no evidence whatsoever that would lead us to believe that there is any corruption at work in the formulation of this settlement" (Pet. App. 23a, n. 7).

On December 21, 1974, the Antitrust Procedures and Penalties Act[5] became law. Section 2 of the Act establishes procedures for the approval of consent decrees in government antitrust litigation. The court asked the parties to comment on the applicability of the Act to the pending proceedings. The United States replied that the procedures already ordered by the court substantially complied with the requirements of Sections 2(b)—2(d) of the Act. However, it argued that AMPI should be required to comply with Section 2(g), which obliges the defendant to disclose certain lobbying contacts concerning or relevant to the proposed consent decree. AMPI maintained that the new Act did not apply to pending proceedings, but, without waiving its position, it filed a statement in response to a request of the court covering the period during which the consent decree was negotiated.

The United States also responded to an informal request of the court by submitting a brief additional list of AMPI contacts with the Antitrust Division between the filing date of the suit and the start of the settlement negotiations. AMPI later filed its own list of contacts covering that period. After NFO objected to AMPI's filings, the government informed the district court that to the best of its knowledge the material filed by AMPI was neither false nor deceptive (Pet. App. 21a-22a; 27a-29a).

The district court held that entry of the consent decree would be in the public interest, and denied NFO's motion to intervene (Pet. App. 13a-43a). The court ruled that NFO was not entitled to intervene as of right under Rule 24(a) because it had not made the showing for intervention required by *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, that the government had defaulted in its

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[5]Pub. L. 93-528, 88 Stat. 1706, 15 U.S.C. (Supp. V) 16.

representation of the public interest by bad faith or malfeasance in settling the case (Pet. App. 32a-33a; 36a). It rejected as unfounded NFO's contention that "corruption was at work in the formulation of the consent decree proposed in this case" (Pet. App. 26a).

Specifically, the court found that the government attorneys who had negotiated and proposed the decree had not been influenced by outside political pressure and had done their work in good faith without malfeasance (Pet. App. 30a). It further noted that NFO, though invited by the court, had failed to produce or promise to produce any evidence of official impropriety beyond that contained in the Watergate Report. The court ruled that that evidence in no way related to the government personnel who formulated the consent decree (Pet. App. 26a, 30a). Because of the insufficiency of NFO's showing, it denied the request for an evidentiary hearing on these matters (Pet. App. 30a).

On NFO's appeal, the court of appeals unanimously affirmed (Pet. App. 1a-11a). The court held that under *Sam Fox*, *supra*, a party seeking to intervene in consent decree proceedings to represent the public interest in competition must show bad faith or malfeasance by the government (Pet. App. 9a). The court agreed with the district court that "the government had acted in good faith." It noted that NFO did not question the integrity (Pet. App. 10a) and good faith of the lawyers who participated in hearings on the degree, and that it had submitted voluminous material on the government's conduct (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct; it does not conflict with any decision of this Court or of any other circuit; and it does not warrant review by this Court.

1. Petitioner's principal claim is that the court of appeals misapplied the dictum in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689, that a private party cannot intervene as of right to challenge the government's settlement of an antitrust suit by a consent judgment "at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." It contends that the court has conditioned such intervention upon the private party making a "conclusive showing" of government bad faith or malfeasance in settling the case (Pet. 34-35).

The two courts below, however, neither stated nor implied that a conclusive showing was necessary. Fairly read, the opinions of the court of appeals and district court hold that NFO had not made even a *prima facie* showing of government bad faith or malfeasance in settling the case.

This Court has long recognized that in federal antitrust litigation it is the United States "which must alone speak for the public interest." *Buckeye Coal & Railway Co.* v. *Hocking Valley Railway Co.*, 269 U.S. 42, 49.[6] Disagreement over the wisdom of the government's settlement of an antitrust suit, such as that petitioner expresses, does not indicate inadequate government representation of the public interest and is not ground for private intervention. *United States* v. *Blue Chip*

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[6]To the extent that petitioner's interest was its own advancement (especially the aiding of its private treble damage suit) rather than the general public interest in competition, this was a private interest which it can pursue in private litigation and which does not justify intervention in a government antitrust suit. *United States* v. *Blue Chip Stamp Co.*, *supra*; *United States* v. *Automobile Manufacturers Association*, 307 F. Supp. 617 (C.D. Cal.), affirmed *sub nom. City of New York* v. *United States*, 397 U.S. 248.

Stamp Co., 272 F. Supp. 432 (C.D. Cal.), affirmed *per curiam sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580; *United States* v. *International Telephone & Telegraph Corp.*, 349 F. Supp. 22 (D. Conn.), affirmed *per curiam sub nom. Nader* v. *United States*, 410 U.S. 919.

Assuming, without conceding, that the dictum in *Sam Fox, supra*, 366 U.S. at 689, permits intervention where the third party makes a "claim of bad faith or malfeasance on the part of the Government" in settling the case,[7] more than a mere conclusory allegation of bad faith or malfeasance is required.[8] The party must support his charges with proof at least sufficient to constitute a threshold, or *prima facie* showing that there was improper conduct in settlement of the case. The two courts below correctly held that NFO made no such showing.

NFO itself admitted that the Antitrust Division attorneys who negotiated the decree (and other Antitrust Division personnel whom its counsel knows) acted in good faith

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[7]Another exception is where the government, or district court, has ignored the mandate of this Court. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 136; *United States* v. *Blue Chip Stamp Co.*, *supra*; *United States* v. *Western Electric Co.*, 1968 Trade Cases, para. 72,415 (D. N.J.), affirmed *per curiam sub nom. Clark Walter & Sons, Inc.* v. *United States*, 392 U.S. 659; *United States* v. *Automobile Manufacturers Association*, *supra*; *United States* v. *Paramount Pictures Inc.*, 333 F. Supp. 1100 (S.D. N.Y.), affirmed *per curiam sub nom. Syufy Enterprises* v. *United States*, 404 U.S. 802. There is no question in this case of conformity to the mandate of this or any other appellate court.

[8]Petitioner apparently recognizes this, since it states: "Intervention, if it is to be meaningful, obviously cannot be made to turn upon the success of the ultimate claim; something less in the way of a preliminary showing must be recognized as sufficient" (Pet. 35).

and without malfeasance (Pet. App. 23a). Nonetheless it speculates that "unnamed high government officials may have influenced the subsequent consent decree proceedings * * *" (Pet. App. 9a). The district court invited NFO to submit evidence to support this charge; NFO submitted only the Watergate Report (Pet. App. 25a).

The district court after careful examination of that Report, which deals with actions by AMPI and the government in 1971 and 1972, rightly concluded that the Report provided no basis for connecting those events with the settlement of the case some years later (Pet. App. 30a). Indeed, the Watergate Report, to the extent that it is relevant at all, tends to support the government's good faith, for it describes the government's prosecution of the case, once started, as "vigorous." See S. Rep. No. 981, *supra*, at 733, n. 83; 729, n. 57.[9] The district court correctly concluded that there was insufficient showing to justify intervention or further inquiry by evidentiary hearing as NFO requested (Pet. App. 30a).[10] The court of appeals agreed (Pet. App. 9a-10a), and there is no reason for this Court further to review this factual issue.[11]

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[9]The court also considered the lists of AMPI contacts supplied by the United States and AMPI, and found them not to show wrongdoing in settlement of the case (Pet. App. 26a; 30a). NFO cites what it calls "an unusual telephone call" from the White House to the Antitrust Division in 1973 (Pet. 14), but ignores the facts that the call took place months before the start of settlement negotiations, and that Deputy Assistant Attorney General Wilson rebuffed the caller (J.A. 686-687).

[10]Petitioner complains about the lack of an evidentiary hearing (Pet. 38-39), but since petitioner did not outline any evidence it proposed to submit in support of its contention of impropriety in settling the case, the court acted within its discretion in not holding a hearing.

[11]Since the court of appeals did not require a "conclusive showing" of government malfeasance or bad faith, petitioner's contention (Pet. 35-36) that such a standard would be inconsistent with *Trbovich* v. *United Mine Workers*, 404 U.S. 528, is irrelevant.

2. Petitioner suggests that even if it failed to meet the established standards for intervention, the Antitrust Procedures and Penalties Act enlarged the scope of intervention as of right in government antitrust suits (Pet. 32a-34a). However, as petitioner states, "[a]dmittedly, the Act does not directly address intervention and adequacy of representation * * *" (Pet. 32).

Section 2(e) of the Act requires the district court to determine that the entry of a consent decree is in the public interest. Section 2(f) provides that in making its Section 2(e) determination the court "may" employ various methods of obtaining information about the proposed decree, one of which is to allow intervention "pursuant to the Federal Rules of Civil Procedure" (Section 2(f)(3)). Petitioner correctly notes that "the Act does not confer upon third parties any right to intervene * * *" (Pet. 38). The Act leaves it to the discretion of the district court to select the appropriate procedures.

The legislative history confirms that the purpose of the procedures listed is to aid the district court in compiling information, and that the court is to decide which procedures are necessary for that purpose. Congress expected that the district court would "adduce the necessary information through the least complicated and least time-consuming means possible." H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974) quoting with approval S. Rep. No. 298, 93d Cong., 1st Sess. (1973); 119 Cong. Rec. 24598-24599 (1973) (statement of sponsor Sen. Tunney). There was no intent to enlarge the right of a private party to intervene. 119 Cong. Rec. 24599 (1973) (Sen. Tunney). After an extensive analysis, the district court in this case correctly concluded that intervention was not necessary

to provide the information required to determine whether the decree was in the public interest.[12]

3. Finally, in a brief "synthesis" of its petition NFO contends that the settlement of the case lacks the "appearance of justice" (Pet. 39-40). The district court and the court of appeals found after careful scrutiny that the decree is in the public interest and that the government acted properly in entering into the decree. In the face of these findings by the two courts below, it is evident that both justice and the appearance of justice were satisfied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12]Petitioner's assertion (Pet. 34) that the United States "collaborated" with AMPI "to nullify" AMPI's compliance with Section 2(g) of the Act is erroneous. In fact, the United States over AMPI's objection urged that AMPI be required to comply with that section. Although the statute speaks only to defendants and places no duty on the government to vouch for a defendant's filing, the government cooperated fully with the district court's request for information, and informed the court that to the best of its knowledge the submission of contacts made by AMPI was neither false nor deceptive (Pet. App. 21a-22a; 25a-29a).

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